Office-Supreme Court, U.S.
FILED
DEC 11 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

COMMUNICATIONS SATELLITE CORPORATION,
Appellant,

v.

FRANCHISE TAX BOARD,
Appellee.

On Appeal From the Court of Appeal of the State of California for the First Appellate District

REPLY BRIEF FOR APPELLANT

Of Counsel

BANCROFT, AVERY & MCALISTER
601 Montgomery Street
San Francisco, CA 94111
Telephone (415) 788-8855

ROBERT L. DUNN
BANCROFT, AVERY & MCALISTER
Counsel of Record

MORRISON & FOERSTER
One Market Plaza
Spear Street Tower
San Francisco, CA 94105
Telephone (415) 777-0600

FRANKLIN C. LATCHAM
MORRISON & FOERSTER

SHEA & GOULD
330 Madison Avenue
New York, NY 10017
Telephone (212) 370-8876

STUART A. SMITH
SHEA & GOULD

Counsel for Appellant Communications Satellite Corporation

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1031

COMMUNICATIONS SATELLITE CORPORATION,
Appellant,

v.

FRANCHISE TAX BOARD,
Appellee.

On Appeal From the Court of Appeal of the State of California for the First Appellate District

---

REPLY BRIEF FOR APPELLANT

---

1. In its Motion to Dismiss or Affirm ("Motion"), Appellee Franchise Tax Board ("the Board") principally argues (Motion, pp. 14-18) that the State of California is free to apportion to itself a share of Comsat's income derived from activities in outer space because "the values associated with the satellites are produced on Earth" (Motion, p. 14). The Board refers the Court to no fact of record upon which this assertion is based and there is none. Indeed, the Board

is unable to offer any more support for its claim than the "invisible connection" theory of the Court of Appeal. The "invisible connection" seen by that court and its conclusion that the satellites "actually 'function' at the California earth station" are without factual basis (Compare Pl. Ex. 2, quoted in the Jurisdictional Statement at p. 14; Stip. ¶ 43). The "invisible connection" theory does not change the undisputed fact that the satellites are not located in California.

The Board claims that "Without the earth stations, [the satellites] would be useless pieces of sophisticated hardware floating around in outer space with no function at all" (Motion, p. 14). But this facile denigration of the role of the satellites does not advance the inquiry. One could just as easily make the same observation with respect to the earth stations and conversely claim that they would be useless without the satellites. The satellites, which receive and generate complex electronic transmissions, and the earth stations, which are no less complex, both perform separate and essential functions in the global satellite communications system.[1] To assert, as the Board does,

---

[1] In a recent decision, the Federal Communications Commission has confirmed the separate nature of the satellite and earth station functions, as contemplated by Section 201(c)(7) of the Communications Satellite Act (47 U.S.C. § 721(c)(7)), by (1) permitting communications common carriers other than Comsat to operate earth stations with the Intelsat satellites and (2) requiring Comsat to file separate "tariffs for INTELSAT space segment usage through its World Systems Division and . . . earth station tariffs through a subsidiary . . . ." *In the Matter of Modification of Policy on Ownership and Operation of U.S. Earth Stations that Operate with the INTELSAT Global Communications Satellite System,*

[*continued next page*]

that satellites permanently located in outer space and income derived from their use are includable in the formula numerators as California property and sales, not only turns technology on its head but "is wrong as a matter of federal constitutional law." (*See* Brief for the United States as *Amicus Curiae* ("*Amicus* Brief"), p. 8).

2. It is settled that "a State may not tax value earned outside its borders," *ASARCO, Inc.* v. *Idaho State Tax Commission,* 458 U.S. 307, 315 (1982) and cases cited therein. Recognizing that Comsat's income necessarily derives from values located in outer space, the Board nevertheless contends that its apportionment formula does not violate the Due Process Clause. (Motion, pp. 18-20). The major premise of this aspect of the Board's argument is that outer space is "up for grabs" and that California is therefore free to apportion to itself a share of Comsat's income derived from activities in outer space. However, the Court has observed that a state's "general desire to raise revenue" is "insufficient to justify the State's intrusion into a sphere . . . heavily regulated by the Federal Government." *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue,* 458 U.S. 832, 839 (1982). As the Solicitor General advised the Court, "outer space [is] a realm of paramount federal concern." (*Amicus* Brief, p. 3). There are at least 21 treaties, conventions and international agreements (listed in the Appendix, *infra*) as well as two major federal statutes, the Na-

---

FCC 84-605 (released December 18, 1984). The Board's contrary position, that the satellites and earth stations are indissolubly linked (Motion, pp. 7-8 n. 3), is its own unsupported conclusion. Compare Stip., ¶ 33.

tional Aeronautics and Space Act of 1958, 42 U.S.C. §§ 2451 *et seq.*, and the Communications Satellite Act of 1962, 47 U.S.C. §§ 701 *et seq.*, which establish federal regulation and control of outer space and satellites.[2]

California cannot frustrate this "paramount federal concern" for outer space reflected by those treaties and statutes. The Court has long held that a state is precluded from taxing income and property, even within its borders, in an area over which the federal government has established a comprehensive regulatory scheme. *See, e.g., Ramah Navajo School Board, Inc.* v. *Bureau of Revenue, supra,* at 845 ("comprehensive federal scheme" of regulation precludes gross receipts tax on non-Indian construction contractor); *Warren Trading Post Co.* v. *Arizona Tax Commission,* 380 U.S. 685 (1965) (gross income tax on company's business on Indian reservation invalid); *Humble Pipe Line Co.* v. *Waggonner,* 376 U.S. 369 (1964) (property tax on equipment of oil lessee on military reservation invalid); *Standard Oil Co.* v. *California,* 291 U.S. 242 (1934) (license tax on the sale of gasoline to post exchange on a military reservation invalid); *Surplus Trading Co.* v. *Cook,* 281 U.S. 647 (1930) (property tax on private personal property on military reservation invalid). It follows, *a fortiori,* that a state will be precluded from reaching beyond its borders to that end. Accordingly, California cannot assert a right to tax income derived

---

[2] In particular, Article VIII of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies provides that signatory nations "shall retain jurisdiction and control" over their satellites. *See* 18 U.S.T. 2410 (1967).

in outer space, an area beyond its borders and an area of "obvious federal concern" (*Amicus* Brief, p. 8), merely because California assumes the income is taxed by no other state.[3]

3. The Board is on no better constitutional footing in including in Comsat's sales factor numerator a portion of Comsat's share of Intelsat's revenues from leasing satellite capacity. The Board's sole rationale for its action is that these revenues have been assigned to California "on the basis of where and what the customer purchases" (Motion, p. 17). Contrary to the Board's assertion, the "customers" of Intelsat are not the common carriers which lease half-circuits from Comsat, but Comsat itself and the other Intelsat members (Stip., ¶ 12). This revenue is earned from leasing satellite capacity, and is entirely independent of the operation of earth stations or the leasing of half-circuits by Comsat. Indeed, Comsat would receive precisely the same amount of income from its

---

[3] The case cited by the Board (*Southern Pacific Co.* v. *Kentucky*, 222 U.S. 63 (1911)) (Motion, p. 19) in support of the supposed principle that California may extend its taxing power beyond its jurisdiction demonstrates no such thing. This case held, based on the "home port" doctrine, that the state of domicile could levy an unapportioned *ad valorem* property tax. The home port doctrine has no continuing validity. It was discredited by the Court as a basis for state taxation in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 441-443 (1979).

Moreover, the District of Columbia is Comsat's domicile, not California. Since there are no earth stations in the District of Columbia, the California formula, unlike the home port rule, would assign no part of the revenues earned in outer space to Comsat's domicile. California can hardly invoke an outmoded rule which would allocate *everything* to the state of domicile in support of its approach.

joint venture interest in Intelsat even if it had no earth stations, in California or anywhere else. Although this revenue is part of Comsat's unitary income subject to apportionment, it is in no way derived from sources within California. Hence, the Due Process and Commerce Clauses prohibit assignment of any portion of the Intelsat revenue to Comsat's California sales numerator.

4. Finally, the Court's action in *Sjong* v. *State Department of Revenue,* 622 P.2d 967 (Alaska 1981), *appeal dismissed,* 454 U.S. 1131 (1982), upon which the Board relies (Motion, pp. 23-25), provides no guidance for the appropriate disposition of this case. There, the taxpayer, a commercial fisherman who fished in the international waters surrounding Alaska, sold his catch exclusively in Alaska. *See* 622 P.2d at 972. In these circumstances, the Alaska Supreme Court upheld Alaska's formula apportionment that assigned 100% of the taxpayer's sales and payroll to the state and allocated his property on a port-day basis. The court therefore rejected the taxpayer's argument that the formula was improper because more than 95% of his business activity was conducted outside Alaska. Since a sales-only formula, such as the one the Court approved in *Moorman Manufacturing Co.* v. *Bair,* 437 U.S. 267 (1978), would have attributed 100% of the taxpayer's income to Alaska, the Alaska formula does not appear to have been impermissible and *Sjong* is therefore distinguishable. In all events, unlike the California income tax to which Comsat continues to be subject, the Alaska income tax at issue in *Sjong* was repealed in 1980. Therefore, that case did not present any questions of continuing significance. *See* No. 81-

504, Motion to Dismiss or Affirm, p. 2. The questions presented in the instant case, however, warrant plenary consideration by the Court.

CONCLUSION

For the reasons stated above and in the Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted,

ROBERT L. DUNN
Counsel of Record

FRANKLIN C. LATCHAM

STUART A. SMITH

Counsel for Appellant
Communications
Satellite Corporation

Of Counsel

BANCROFT, AVERY & MCALISTER

MORRISON & FOERSTER

SHEA & GOULD

Dated: February 11, 1985

APPENDIX

APPENDIX

Treaties, Conventions and Other International Agreements As of December 1983 *

1. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (October 10, 1963), 14 UST 1313, TIAS 5433, 480 UNTS 43.

2. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (October 10, 1967), 18 UST 2410, TIAS 6347, 610 UNTS 205.

3. Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space (December 3, 1968), 19 UST 7570, TIAS 6599, 672 UNTS 119.

4. Convention on International Liability for Damage Caused by Space Objects (October 9, 1973), 24 UST 2389, TIAS 7762.

5. Convention on the Registration of Objects Launched into Outer Space (September 15, 1976), 28 UST 695, TIAS 8480.

6. Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques (January 17, 1980), TIAS 9614.

7. The 1973 International Telecommunications Convention, TIAS 8572.

8. The Radio Regulations, 12 UST 2377, TIAS 4893.

---

* In addition to these multilateral agreements, there are at least 20 bilateral agreements between countries.

9. International Telecommunications Satellite Organization (INTELSAT) Agreement (February 12, 1973), 23 UST 3813, TIAS 7532.

10. Operating Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT) (February 12, 1973), 23 UST 4091, TIAS 7532.

11. Headquarters Agreement Between the Government of the United States of America and the International Telecommunications Satellite Organization (INTELSAT) (November 24, 1976), 28 UST 2248, TIAS 8542.

12. Convention on the International Maritime Satellite Organization (INMARSAT) (July 16, 1979), TIAS 9605.

13. Operating Agreement on the International Maritime Satellite Organization (INMARSAT) (July 16, 1979), TIAS 9605.

14. Agreement on Cooperation in International Testing in Connection with Experimental Communications Satellites (September 14, 1963), 14 UST 1278, TIAS 5431, 488 UNTS 121.

15. Agreement for a Cooperative Program Concerning a Space Laboratory in Conjunction with the Space Shuttle System (August 14, 1973), 24 UST 2049, TIAS 7722.

16. Agreement Relating to a Space Research Project Using Sounding Rockets (October 19, 1973), 25 UST 856, TIAS 7830.

17. Memorandum of Arrangement to Cover Reentry Experiments in Australia (Project Sparta) (March 30, 1966), 17 UST 350, TIAS 5984.

18. Agreement Concerning Conditions for the Furnishing of Assistance by NASA for the Launching of the French-German Symphonie Communications Satellites (June 24, 1974), 25 UST 3431, TIAS 7994.

19. Aerosat Memorandum of Understanding (August 12, 1974).

20. Agreement Concerning the NATO Satellite Communications Earth Terminal in the United States (August 20, 1970), 21 UST 2089, TIAS 6955, 764 UNTS 225.

21. Agreement Between the National Aeronautics and Space Administration of the United States of America and the Arab Satellite Communications Organization for Launch and Associated Services for Arabsat Payloads (No. 1176-001, November 22, 1982).